TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 185

ARTHUR E. DONEGAN, APPELLANT,

vs.

B. E. DYSON, AS UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF FLORIDA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED OCTOBER 2, 1935

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 19, 1925

[fol. 1] **IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA**

ARTHUR E. DONEGAN, Petitioner,

vs.

B. E. DYSON, as U. S. Marshal for the Southern District of Florida, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 8, 1924

To the Honorable Rhydon M. Call, Judge:

The Petition of Arthur E. Donegan shows the following:

1. That in the United States District Court for the Southern District of Florida and in the Tampa Division he was indicted lately on, to-wit, the 5th day of March, 1919, charged with the offenses of misapplication and of abstraction in violation of the banking laws of the United States.

2. That thereafter and at a subsequent term of said Court held in said Division he was tried, convicted and sentenced to a term of three years' imprisonment in the Atlanta penitentiary.

3. That your petitioner sued out a writ of error from said conviction and in the Circuit Court of Appeals for the Fifth Circuit said conviction was affirmed. A motion for rehearing was made by your petitioner and by that Court denied; and thereafter a petition for the sanction of a certiorari was filed in the Supreme Court of the United States and denied by that Court. The mandate of the United States Circuit Court of Appeals for the Fifth Circuit was in due course sent to and filed in this Court, and an order of this Court has been [fol. 2] lately made directing the issuance of a commitment for your petitioner, which commitment has been issued and lodged with the United States Marshal for the Southern District of Florida.

4. That in pursuance of said commitment your petitioner is now in the custody of said United States Marshal, who holds your petitioner for delivery to the United States penitentiary at Atlanta, Georgia, forthwith.

5. Your petitioner alleges that his trial, conviction and sentence was unauthorized, illegal and of no effect whatever and his present detention by respondent is illegal, for the following reasons:

(a) Said term of this Court held at Tampa, Florida, at which your petitioner was tried, convicted and sentenced, was presided over and held by Hon. Julian W. Mack; that said Judge Julian W. Mack was one of the five additional United States Circuit Judges appointed at or about the time of the creation of the Court of Commerce, created by virtue of the Act of June 18, 1910; and was one of the Judges assigned

by the President of the United States to that Court; that thereafter, by Act of Congress provided to take effect December 31, 1915, the said Court of Commerce was abolished and its jurisdiction vested in the United States District Court; that the several Judges of said Court of Commerce remained during good behaviour U. S. Circuit Judges subject to designation for service from time to time in certain courts of the United States as by Acts of Congress then and thereafter provided; that the said Julian W. Mack came to the Southern District of Florida and acted or professed to act as the Judge of the said District Court in the said trial of your petitioner, claiming his jurisdiction, power and right to do so under and by virtue of a designation of himself to sit as said Judge at said term by the Honorable the Chief [fol. 3] Justice of the United States, a copy of which order of designation is hereto annexed, especially referred to and made Exhibit A and a part hereof.

(b) That the designation of the said Circuit Judge by the said Chief Justice was not authorized by section 201 of the Judicial Code, as amended, because said section 201 was repealed by the Act of October 22nd, 1913, and that if any jurisdiction or power was conferred on the said Julian W. Mack by virtue of said order of Chief Justice that it conferred on him only such power and jurisdiction as a Circuit Judge of the Fifth Circuit had at that time in a District Court within the Fifth Circuit.

(c) Your petitioner further shows that neither at the date of the designation of said Julian W. Mack by the Chief Justice to preside in said District Court, nor at any time prior to or including the trial, conviction or sentence of your petitioner, had any one of the Circuit Judges of the Fifth Circuit, been authorized, designated or empowered to hold the District Court of the United States at which your petitioner was tried, convicted and sentenced.

(d) Your petitioner alleges the facts to be, that prior to the designation of the said Julian W. Mack to hold the above mentioned Court in said District, no action whatever in regard to said designation was taken by the Clerk of this Court; or the presiding judge of the Circuit Court of Appeals for the Fifth Circuit, or any of the Circuit Judges for the Fifth Circuit; or the Circuit Justice for said Fifth Circuit, or the Chief Justice of the United States, authorizing any one of the Circuit Judges for the Fifth Circuit to hold the Tampa term of the said United States District Court; that the necessity for Judge Julian W. Mack or any other District or Circuit Judge to hold said Court was [fol. 4] never certified or determined in any of the ways required by law, and that the said Julian W. Mack in the trial, conviction and sentence of your petitioner was entirely without either jurisdiction or power necessary to give validity and effect to any of the proceedings in the trial, conviction and sentence of your petitioner.

Your petitioner alleges that giving full faith to all of the recitals and terms of the order of designation, Exhibit A hereto, and to the presumptions to be indulged therefrom, that yet the facts are (and the contrary is not recited in or to be implied in said order) that none

of the events had happened or conditions existed to authorize or validate either the said order of designation or the certificate of urgency and accumulation of business in said order recited, or to vest the said Julian W. Mack with jurisdiction or power to hold the said term of the United States District Court.

Your petitioner, upon the premises alleges that his restraint and detention by the United States Marshal under said process of commitment is unlawful; and that by reason of petitioner's trial, conviction, sentence, commitment and detention, he is and has been deprived of due process of law, all in violation of Article Five of the Amendments to the Constitution of the United States; and thereupon, he prays that a writ of habeas corpus may issue directed to the said United States Marshal, requiring him forthwith or at a convenient time to be fixed, to produce your petitioner before Your Honor in this Court, to dispose of your petitioner as law and justice require.

Arthur E. Donegan, Petitioner. Alexander Ackerman, Wm. M. Toomer, Attorneys for Petitioner.

[fol. 5] Sworn to by Arthur E. Donegan. Jurat omitted in printing.

[fol. 6] EXHIBIT "A" TO PETITION

Honorable Julian W. Mack, United States Circuit Judge, New York City, New York.

SIR: The Senior Circuit Judge of the Fifth Circuit having certified that on account of the accumulation and urgency of business in the United States District Court for the Southern District of Florida, it would be a great public advantage if you could be assigned to service in said District court, and your consent in writing to be designated and appointed to serve in said district court having been duly signed and exhibited to me, now, therefore, pursuant to the authority vested in me by section 201 of the Judicial Code of the United States as amended by the acts of congress approved October 22, 1913, I do Hereby Designate and Assign you for service in the District Court of the United States for the Southern District of Florida, during the period commencing January 20, 1923, and ending March 31, 1923 and for such further time as may be required to complete unfinished business.

Dated January 11th, 1923, Washington, D. C.,

Wm. H. Taft, Chief Justice of the United States.

UNITED STATES OF AMERICA,
Southern District of Florida:

I, Edwin R. Williams, Clerk of the United States District Court, in and for the Southern District of Florida, and as such the legal custodian of the records and files of said court, do hereby certify the

foregoing to be a true and correct copy of an order designating Judge Julian W. Mack to preside in the Southern District of Florida as the same appears of record and file in the office of the Clerk of said Court.

[fol. 7] Witness my hand and the official seal of said court this the 5th day of July, 1924.

Edwin R. Williams, Clerk U. S. District Court, Southern District of Florida, by Anna W. Williams, Deputy Clerk. (Seal.)

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING WRIT OF HABEAS CORPUS—Filed July 9, 1924

The foregoing petition with the Exhibit annexed thereto and the verification thereof having been duly filed in the office of the Clerk of this Court and presented to me.

And the United States Attorney expressing a wish to be heard at a later date.

It is thereupon considered, ordered and adjudged by the Court that the writ of Habeas Corpus be, and the same is by the terms of this order, issued; ordered further that a copy of this order be served on the United States Attorney and the Marshal of this District and ordered further that the said writ be made returnable before me at my Chambers in Jacksonville at ten o'clock A. M., July 18th, 1924.

Made and dated at Jacksonville, Florida, this July 9th, 1924.

Rhydon M. Call, United States Judge.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING PETITIONER TO BE AT LARGE—Filed July 9, 1924

The petitioner in the case above stated having filed and presented his petition for the writ of Habeas Corpus and the writ having issued made returnable before me at Jacksonville at ten o'clock A. M. on July 18th, 1924.

It is ordered that the petitioner, Arthur E. Donegan, until said hearing on July 18th, 1924, and until the further order of the

Court, be enlarged and at liberty under the supersedeas bond heretofore given by him in said cause and now of full force and effect.

Made and ordered at Jacksonville, Florida, this July 9th, 1924.

Rhydon M. Call, United States Judge.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

MARSHAL'S RETURN TO THE WRIT OF HABEAS CORPUS—Filed July 18, 1924

Comes now the United States Marshal Southern District of Florida, and for return to the writ of habeas corpus herein made and entered shows unto the Court,

I. That at the date of the issuance of this writ the defendant Arthur E. Donegan was in custody of the United States Marshal by virtue of a final commitment issued out of the United States District Court, Southern District of Florida, a copy whereof is hereto attached and the original herein exhibited.

II. And the United States Marshal pursuant to the direction of said Writ of Habeas Corpus and the order subsequently made releasing said defendant on a supersedeas bond theretofore given by said defendant herewith produces said defendant in Court.

Respectfully submitted this July 18, A. D. 1924.

B. E. Dyson, United States Marshal, by N. L. Pinder, Chief Deputy.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

COMMITMENT

UNITED STATES OF AMERICA,
Southern District of Florida:

The President of the United States of America to the Marshal of the Southern District of Florida and the Warden or other Proper Officer of the United States Penitentiary at Atlanta, Ga., Greeting:

Whereas, Arthur E. Donegan has been convicted in the District Court of said District for violation of Section 5209 of the R. S. of the United States, by unlawfully Abstracting and Misapplying funds of a National Bank, and has been sentenced to be imprisoned by

confinement in the United States Penitentiary at Atlanta, Ga., for a term of Three years, on each of the 1st and 2nd counts of Indictment, sentence to run concurrently, and beginning from the date of his delivery to said penitentiary,

Now, these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Arthur E. Donegan to the custody of the Warden or other proper officer of the United States Penitentiary at Atlanta, Ga., and to leave with said Warden a certified copy of this Writ, and to command you, the Warden of said Penitentiary, to receive the said Arthur E. Donegan a prisoner of the United States of America, into your custody, in said Penitentiary, and him there safely to imprison by confinement for a term of three years, on each of the 1st and 2nd counts of the Indictment, sentence to run concurrently, and beginning from the date of his delivery to said Penitentiary, or until he be thence discharged by due course of law.

Witness the Honorable Rhydon M. Call, Judge of the said District Court of the United States, at Jacksonville, Fla., in said District, this 30th day of June, A. D. 1924.

Edwin R. Williams, Clerk U. S. District Court, Southern District of Florida, by Geo. T. Kilner, Deputy Clerk.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER REMANDING PETITION TO CUSTODY OF THE MARSHAL—Filed July 28, 1924

This cause coming on to be heard upon the petition, the writ of habeas corpus and the Marshal's return; and the same having been argued and submitted upon the motion of the petitioner that he be discharged from custody under the commitment heretofore issued out of this Court June 30th 1924; and the Court being advised of its judgment herein;

It is considered by the Court that said motion be and the same is hereby denied and said petitioner, Arthur E. Donegan be, remanded to the Custody of the Marshal of this District to be transported to the Atlanta Penitentiary pursuant to said commitment issued as aforesaid.

Upon application of the petitioner, it is ordered that he be allowed his writ of error from the Circuit Court of Appeals of the 5th Circuit, and that supersedeas bond in the sum of $5,000.99 be fixed. That upon the approval by the Marshal of said bond, the petitioner be released from the marshal's custody pending the hearing and determination of said writ of error.

Done and ordered at Jacksonville this July 25, 1924.

Rhydon M. Call, Judge.

[File endorsement omitted.]

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed July 25, 1924

W. M. Toomer, of Jacksonville, Florida, and Alexander Ackerman, or Orlando, Florida, Attorneys for Petitioner.

Maynard Ramsey, of Jacksonville, Florida, Assistant U. S. Atty., for the U. S. Marshal.

CALL, District Judge:

In this case the petitioner was convicted at the Tampa term of this Court, presided over by Judge Julian W. Mack, a Circuit Judge of the United States, appointed under the provisions for the appointment of five additional Circuit Judges in the Act establishing the Commerce Court. Judge Mack presided at the term of the Court by virtue of a designation made by the Chief Justice of the United States Supreme Court.

It is contended that Judge Mack was neither a Judge Defacto nor De jure in holding said term of the District Court. It is admitted by counsel for petitioner that in the event Judge Mack occupied either position, the petitioner must be remanded to the custody of the Marshal and the commitment executed.

In the designation of the Chief Justice, Section 201 of the Judicial Code is given as authority for the designation. That Sections reads as follows:

"The five additional Circuit Judges authorized by the Act to [fol. 14] create a Commerce Court * * * from time to time shall be designated and assigned by the Chief Justice of the United States for service in the District Court of any District, or the Circuit Court of Appeals for any Circuit, or in the Commerce Court, and when so designated and assigned for service in a District Court or Circuit Court of Appeals shall have the powers and jurisdiction in this Act conferred upon a Circuit Judge in his Circuit." (36 Stats. L. 1147.)

It is contended that this Section of the Judicial Code was repealed by the Act of October 22nd, 1913, Chap. 32. The pertinent portion of the Act reads as follows:

"And all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges, now acting as Circuit Judges by appointment under the terms of said Act, but such judges shall continue to act under assignment as in said Act provided, as judges of the District Courts and Circuit Court- of Appeals;".

It seems clear to me that Section 201 of the Judicial Code was not repealed by the Act abolishing the Commerce Court and that the

several provisions of the Code and Acts amendatory thereto as to the designation of District Judges to preside outside of their respective Districts or Circuit Judges to preside in District Courts in their Circuits have no bearing upon the question here at issue. It seems to me equally clear that Section 201 of the Judicial Code vests in the additional Circuit Judges appointed pursuant to the Act the jurisdition to preside in the District Court when so designated to do so by the Chief Justice. It therefore follows that under the facts shown in the petition and the return that the petitioner must be remanded to the custody of the Marshal that the commitment may be executed. [fol. 15] The petitioner having requested that in the event judgement should go against his petition, a writ of error from the Circuit Court of Appeals of this Circuit be allowed and a supersedeas bond be fixed, the request will be granted and supersedeas bond fixed at $5,000.00.

Judgment remanding the petitioner.

Rhydon M. Call, Judge.

At Jacksonville, Florida, this 25th day of July, 1924.

[File endorsement omitted.]

[fol. 16] In United States District Court

[Title omitted]

Petition for Appeal—Filed July 28, 1924

To Hon. R. M. Call, District Judge:

The above named Arthur E. Donegan, feeling aggrieved by the judgment, decree, and order, rendered in the above entitled case on the 25th day of July, A. D. 1924, does hereby appeal from the said judgment, decree, and order, to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, D. C., under the rules of said court in such cases made and provided, and your petitioner further prays that proper order relating to the security to be required of him be made.

W. M. Toomer, Alexander Akerman, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 28, 1924

Now comes the petitioner in the above entitled case and files the following assignment of errors upon which he will rely upon his prosecution of appeal in the above entitled cause from the judgment, decree, and order made by this Honorable Court on the 25th day of July, 1924:

1. The United States District Court for the Southern District of Florida erred in refusing to grant the motion of the petitioner that he be discharged upon the Marshal's return.

2. The court erred in refusing to hold that the conviction of petitioner in a district court presided over by a circuit judge other than a circuit judge of the Fifth Circuit, was a denial to petitioner of due process of law, as guaranteed to him by the Fifth Amendment to the Constitution of the United States.

3. The court erred in remanding petitioner to the custody of the United States Marshal for the Southern District of Florida to be transported to the Atlanta penitentiary pursuant to the commitment theretofore issued by said court.

4. The court erred in rendering a final judgment against petitioner denying his discharge upon the writ of habeas corpus and the return thereto.

Wherefore the petitioner prays that the said judgment, decree and order be reversed.

W. M. Toomer, Alexander Akerman, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 28, 1924

On motion of Alexander Akerman and W. M. Toomer, Solicitors and Counsel for Petitioner, Arthur E. Donegan, it is hereby ordered that an appeal to the Supreme Court of the United States from the order, judgment and decree heretofore filed and entered herein, dated July 25th, 1924, be and the same is hereby allowed, and that a certified transcript of the record, exhibits and all proceedings be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal for costs and damages be and the same is hereby fixed at the sum of $1,000.00.

Ordered this 28th day of July, 1924.

Rhydon M. Call, Judge.

[File endorsement omitted.]

[fol. 19] CITATION—In usual form, showing service on B. E. Dyson; filed July 28, 1924; omitted in printing

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[fols. 20 & 21] BOND ON APPEAL FOR $1,000—Approved and filed Aug. 1, 1924; omitted in printing

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[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 13, 1924

To the Clerk of the District Court of the United States in and for the Southern District of Florida:

The appellant, Arthur E. Donegan, hereby requests you to make up a transcript of the record in this case for the Supreme Court of the United States, in accordance with the following instructions:

1. Copy petition for writ of habeas corpus and exhibit thereto annexed filed July 9, 1924.

2. Copy order of Court granting writ of habeas corpus filed July 9, 1924.

2 A. Copy of Order of Court July 9, 1924 allowing Petitioner to be at large on his original supersedeas bond pending the hearing of this Habeas Corpus proceeding.

3. Copy return of B. E. Dyson as United States Marshal to writ of habeas corpus, including exhibit thereto filed July 18, 1924.

4. Copy order and decree of court remanding petitioner, Arthur E. Donegan, to custody of the United States Marshal for the Southern District of Florida.

5. Copy opinion of court filed July 25, 1924.

6. Copy petition for appeal filed July 28, 1924.

7. Copy assignment of errors filed July 28, 1924.

[fol. 23] 8. Copy order allowing appeal.

9. Copy citation issued to B. E. Dyson as United States Marshal, which was filed July 28, 1924, and Marshal's acceptance of service.

10. Copy of cost bond.

11. Copy these instructions.

Alexander Akerman, W. M. Toomer, Attorneys for Petitioner, Arthur E. Donegan.

Service acknowledged of a copy of the foregoing præcipe this August 13th, 1924.

B. E. Dyson, U. S. Marshal, by N. L. Pinder, Chief Deputy.

[File endorsement omitted.]

[fols. 24 & 25] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Edwin R. Williams, Clerk U. S. District Court, in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify the foregoing pages numbered from 1 to 23 inclusive to comprise a true and correct transcript of the proceedings in this Court in the case of Arthur E. Donegan vs. B. E. Dyson, United States Marshal for the Southern District of Florida, as the same appears of record in the records and files of this Court aforesaid.

Witness my hand and the official seal of this Court this 19th day of August, A. D. 1924.

Edwin R. Williams, Clerk U. S. District Court for the Southern District of Florida, by Susan F. Williams, Deputy Clerk. (Seal of District Court of the United States, Southern District of Florida.)

Endorsed on cover: File No. 30,644. S. Florida D. C. U. S. Term No. 185. Arthur E. Donegan, appellant, vs. B. E. Dyson, as United States Marshal for the Southern District of Florida. Filed October 2nd, 1924. File No. 30,644.

FILED
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WM. R. S

In the Supreme Court of the United States

October Term 1925

No. 185

ARTHUR E. DONEGAN, *Appellant*,

vs.

B. E. DYSON, as United States Marshal for the Southern District of Florida, *Appellee*.

Appeal from the District Court of the United States for the Southern District of Florida

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM UNDER RULE 6

BRIEF AND ARGUMENT IN BEHALF OF ARTHUR E. DONEGAN, APPELLANT

ALEXANDER AKERMAN,
W. M. TOOMER,
Attorneys for Appellant.

THE DREW PRESS, JACKSONVILLE 453201

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 185

ARTHUR E. DONEGAN, *Appellant*,

vs.

B. E. DYSON, as United States Marshal for the Southern District of Florida, *Appellee*.

Appeal from the District Court of the United States for the Southern District of Florida

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM UNDER RULE 6

BRIEF AND ARGUMENT IN BEHALF OF ARTHUR E. DONEGAN, APPELLANT

The case is sufficiently and correctly stated in the statement by the Solicitor General accompanying the motion herein, and a further statement is unnecessary.

In the statement of the case reference is made to the appellant "having thus exhausted the oppor-

tunities for direct review of his conviction" and "that the appellant may without further delay begin to serve the sentence imposed upon him nearly three years ago." In the historical review of the case reference is made to the fact that this Court denied appellant's petition for certiorari (265 U. S. 585). In this connection it is submitted that the presentation, the sanction or the denial of a petition for certiorari in this Court neither affirms nor denies any legal proposition presented; but it is true with regard to the petition for certiorari referred to, that the entire record in this case is now in the files of this Court and may for any purpose be consulted by the Court on its own motion or for its own purposes. A reference to this record will disclose:

(a) That the offense for which appellant was indicted and convicted was never committed at all. Putnam vs. U. S., 162 U. S. 687.

(b) That if the offense alleged was committed it was not committed by any of the means alleged in the indictment.

(c) That if said offense was committed and committed by any of the means alleged, that appellant had no connection with it, either by act, conduct, presence, authorization, ratification, or knowledge.

In these circumstances and while this Court may not feel at liberty or inclined, in this proceeding, to test the title, both de jure and de facto of a Judge, to reconsider its denial of appellant's petition for certiorari, and sanction the petition and order the judgment of the Circuit Court of Appeals reversed, yet this much at least is true, and that is that this

appellant should not upon this summary motion be denied the right of oral argument and personal appearance by himself or counsel in the Supreme Court of the United States. A motion to have this case advanced or allowed to come up in its order, would have been much more considerate. It cannot have escaped the attention of the Attorney General and the Solicitor General, now familiar with the entire record and history of this case, that it was affirmed in the Circuit Court of Appeals upon the announcement of a rule of evidence prevailing nowhere in the world, except in Russia, and directly in conflict with the rule of this Court in U. S. ex rel. Bilokumsky vs. Tod, U. S. Supreme Court, Nov. 12, 1923, and directly in defiance of the Act of Congress dated March 16, 1878, Sec. 1465, Compiled Statutes of 1913, providing among other things, "The person so charged shall at his own request, but not otherwise, be a competent witness, *and his failure to make such request shall not create any presumption against him.*"

The foregoing is submitted for such aid as it may be to the Court in determining whether this case will be taken up in its regular order and determined after oral argument by counsel, or whether it will be called summarily and the appellant denied the privilege of appearing by counsel in the presentation of an important question involving the jurisdiction and power of a Judge.

THE DISTRICT JUDGE WHO PRESIDED IN THE TRIAL COURT WAS NOT A JUDGE DE JURE.

He, Judge Julian W. Mack, was one of the five additional circuit judges appointed and assigned to the Court of Commerce pursuant to the Act of June 18, 1910, Chap. 309, 36 Statutes at Large, 539. He was *a judge without a circuit,* and, so far as the record discloses and appellant is advised, was never assigned to the *Fifth Circuit.*

The Court of Commerce was abolished by the Act of Congress approved October 22, 1913, which took effect December 31, 1913. This Act among other things provided that "such judges shall continue to act under assignment *as in the said Act provided* as judges of the district courts and circuit courts of appeals."

Two propositions are submitted in this connection:

1. That the provisions of the above mentioned Act of October 22, 1913, repealing "All Acts and parts of Acts in so far as they relate to the establishment of the Commerce Court," operated to repeal Sections 200 to 206, inclusive, of the Judicial Code.

2. If Section 201 of the Judicial Code was not repealed as in conflict with the other statutory machinery provided for the designation of circuit judges to hold district courts, then it is submitted that a Circuit Judge, surviving the Court of Commerce, *a Judge without a circuit,* when and if as-

signed to the Fifth Circuit or any other circuit, comes to the circuit, and by the express terms of Section 201 of the Judicial Code "shall have the power and jurisdiction in this Act (meaning the Act adopting the Judicial Code), conferred upon *a circuit judge in his circuit.*"

A circuit judge of the Fifth Circuit, for example, under the Judicial Code and under the law, has absolutely no jurisdiction or power in the first instance and in the absence of proper designation to hold a district court in his own circuit.

Nothing is to be found in the statutes authorizing the senior circuit judge of a circuit to make a certificate of accumulation and urgency of business as a basis for a circuit judge of the class to which Judge Mack belonged to come into the Fifth Circuit and hold a district court. It is conceded, we assume, that no other *circuit judge of any circuit* in the United States, other than the Fifth Circuit, could legally hold a district court within the Fifth Circuit under any possible sort of designation.

A survivor of the Court of Commerce in proper circumstances, properly certified, beginning with the Clerk's certificate, might possibly do so if he were assigned by the Chief Justice to the Fifth Circuit and by the presiding Judge or Judges of that Court assigned to the district court.

It may be contended that support is found for the designation of this particular circuit judge to hold this court in Section 18 of the Judicial Code. This Section according to its terms as it originally stood, may have justified the Chief Justice in mak-

ing this designation of this Circuit Judge, but by the Act of Sept. 14, 1922, Chap. 306, 42 Stat. at Large, 837, Sec. 18 of Judicial Code was amended. The substance of the amendment of Section 18 is to authorize the Chief Justice in the circumstances mentioned to designate and assign any circuit judge *of a judicial circuit* to hold a district court *within such circuit.* Said Section 18 as amended further provides that during the period of service of any judge designated and assigned under this Act, he shall have the powers and rights and perform all the duties of a judge of the district or a justice of the court to which he has been assigned (except, etc.) This Section 18 as amended clearly is legislation affecting circuit judges within their respective circuits, so far as holding a district court is concerned, although by reference to the old Judicial Code it may be construed to give a visiting judge like Judge Julian Mack assigned to and sitting in the Circuit Court of Appeals, the power and jurisdiction of a judge of that court.

The two paragraphs of Section 18 as amended of the Judicial Code are to be construed together, and what Congress had in mind was the designation of a *circuit judge of a judicial circuit to hold a district court within and only within such circuit.*

While Section 986 of the United States Compiled Statutes, quoting Judicial Code, Sec. 19, says that it shall be the duty of the District or Circuit Judge who is designated or appointed under either of these preceding sections, to discharge all the judicial duties for which he is so appointed, and dur-

ing the time for which he is so appointed, and all of the acts and proceedings in the courts held by him or by and before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the District Judge of the said District Court; yet by reference to said six preceding sections it will be noted that the *circuit judge* there spoken of, and only such a judge, was *a circuit judge of the circuit within which the proposed district court was to be held.*

The appointment of another judge in these circumstances could only be made by one of the circuit judges of the circuit in which the district lies or the circuit justice for that circuit, and then only when the fact of the accumulation or urgency of business is made to appear by the certificate of the Clerk of the Court under the seal of the Court, addressed to a Circuit Judge, or in the absence of all of them, to the Circuit Justice.

If the order designating Judge Mack is sought to be sustained under Judicial Code, Sec. 15, it will be noted that the Chief Justice may designate a district judge within such circuit or within any other circuit, but only under the conditions named in Sec. 15, and upon a *certificate of the Clerk of the District Court* to the Chief Justice.

All of the pertinent provisions of the Judicial Code and all of the Acts of Congress in regard to the designation of judges are to be construed together and when so construed it is clear that all such designations and assignments on account of accumulation of business, absence of circuit judges or of cir-

cuit justice, new appointments and revocations and designations in aid of other judges, are to be based initially upon a certificate of the Clerk of the District Court. These are the plain terms of the law, and must be complied with to give any validity or support either to the certificate of the presiding judge of a circuit or to a designation by the Chief Justice made thereon.

JUDGE JULIAN W. MACK WAS NOT A JUDGE DE FACTO

The doctrine of de facto judges has been said to have no application where there is already an incumbent of the office. Moriss vs. Virginia Insurance Company, 8 S. E. Rep. 383; Keith vs. The State, 49 Ark. 439.

The authority of substituted judges is sustained, not under the de facto rule, but because they are, for the time being, lawful judges in the courts wherein they sit. Kennedy vs. Com., 78 Ky. 447.

When a mode of selection is prescribed of a substitute, or special judge, and it indicates the causes which will justify such selection, it excludes other modes of selection and other causes. State vs. Phillips, 27 La. Ann. 663.

The King himself, though he be entrusted with the whole executive power of the law, cannot sit in judgment in any court, but his justice and the laws must be administered according to the powers com-

mitted to and distributed among his several courts of justice. 2 Bac. Abr. 619.

They cannot act by deputy, nor in any way transfer their power to another. Id. 620.

The Act of April 10, 1869, providing for the appointment of circuit judges, gave them the same power and jurisdiction in a circuit as the justice of the Supreme Court allotted to that circuit.

Every construction on the question of jurisdiction and power of a circuit judge in a district court should be strict, because his jurisdiction and power was originally only that of the Supreme Court Justice allotted to the circuit, because the circuit court when in existence had no criminal jurisdiction except in a limited class of cases, and was a court of appeal or review from the district court.

Attorneys for Arthur E. Donegan, Appellant.

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PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the District Court is reported in 1 F. (2d) 63, and appears at R. 7–8. This case is a petition for habeas corpus to secure release after conviction. Previous decisions on direct review are found, sub. nom. *Donegan* v. *United States*, in 296 Fed. 843, and 265 U. S. 585 (denial of petition for certiorari).

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 185

ARTHUR E. DONEGAN, APPELLANT

v.

B. E. DYSON, AS UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF FLORIDA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT

The Solicitor General, on behalf of the appellee in the above-entitled cause, moves the Court, under Rule 6, to dismiss the appeal herein, or to affirm the judgment of the court below, on the ground that the appeal is frivolous and without merit, the sole question presented being expressly covered by the unambiguous language of statute law.

STATEMENT

The appellant, Donegan, was convicted in the Southern District of Florida on an indictment which charged willful abstraction and misapplica-

tion of the funds of a national bank, of which he was president. He was tried and sentenced by Judge Mack, one of the additional Circuit Judges appointed under the Commerce Court Act of June 18, 1910, c. 309 (36 Stat. 539). Judge Mack held the term under a special designation from the Chief Justice (R. 3). The Circuit Court of Appeals sustained Donegan's conviction (296 Fed. 843); and this Court denied his petition for certiorari (265 U. S. 585).

Having thus exhausted the opportunities for direct review of his conviction, he has now sued out a writ of *habeas corpus,* to obtain his release from the custody of the marshal. The sole ground of his application for the writ is his contention that Judge Mack was without authority to preside at the trial, and that his conviction was therefore a denial of due process of law. The District Court refused to accept this contention and ordered him remanded to serve his sentence. Its opinion is reported in 1 F. (2d) 63, and appears also at pages 7–8 of the Record. On this altogether frivolous issue, he is now for the second time seeking review or delay in this Court.

STATUTES INVOLVED

Section 1 of the Act creating the Commerce Court provides (Act of June 18, 1910, c. 309, 36 Stat. 539, 540):

> * * * The President shall, by and with the advice and consent of the Senate,

> appoint five additional circuit judges, no two of whom shall be from the same judicial circuit, who shall hold office during good behavior and who shall be from time to time designated and assigned *by the Chief Justice of the United States* for service in the circuit court for any district, or the circuit court of appeals for any circuit, or in the commerce court. * * *

Judge Mack was one of the five additional circuit judges appointed under this section.

During the period when the Commerce Court was in existence, the Judicial Code was enacted. Section 201 of the Judicial Code provides (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1147):

> The five additional circuit judges authorized by the Act to create a Commerce Court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned *by the Chief Justice of the United States* for service *in the district court of any district,* or the circuit court of appeals for any circuit, [or in the Commerce Court], and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit.

Section 18 of the Judicial Code as amended provides (Act of Sept. 14, 1922, c. 306, 42 Stat. 837, 839):

> The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a District Court within such circuit * * *. During the period of service of any judge designated and assigned under this Act he shall have all powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds): *Provided, however,* That in case a trial has been entered upon before such period of service has expired and has not been concluded, the period of service shall be deemed to be extended until the trial has been concluded.

Section 19 of the Judicial Code provides (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1090):

> It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

Section 118 of the Judicial Code, as amended, provides (Act of February 25, 1919, c. 29, 40 Stat. 1156, 1157):

> * * * The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided, That nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided for and authorized in other sections of this Act.*

By the Act of October 22, 1913, c. 32 (38 Stat. 208, 219), the Commerce Court was abolished, without prejudice to the tenure of the judges then in office. The Act provided:

> * * * Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, *but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals;* and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed. [Italics ours.]

ARGUMENT

Under the clear language of the statutes above cited, Judge Mack's designation was valid and proper.

Judge Mack was designated, by a letter from the Chief Justice, to hold the term at which the appellant was convicted. The Chief Justice's

letter (R. 3) recites that the Senior Circuit Judge has certified an urgency of business in the district, and that Judge Mack has consented to serve. It then states:

> * * * now, therefore, pursuant to the authority vested in me by Section 201 of the Judicial Code of the United States as amended by the acts of congress approved October 22, 1913, I do Hereby Designate and Assign you for service in the District Court of the United States for the Southern District of Florida, during the period commencing January 20, 1923, and ending March 31, 1923, and for such further time as may be required to complete unfinished business.

In the court below the appellant strenuously argued that Section 201 of the Judicial Code was repealed by the Act of 1913 (supra). The basis for this argument is nowhere apparent. The Act of 1913 specifically provided that the judges in question should "*continue to act under assignment,*" *as judges of the district courts* and circuit courts of appeals. Under both the original Act of 1910 and Section 201 of the Judicial Code this assignment is to be made *by the Chief Justice.* It is submitted that the language of all these acts is clear, that it means precisely what it says, and that by no possible twisting of words can it be brought to mean something entirely different. Under the above acts the judges mentioned have held court for more than twelve years;

and so far as can be discovered, their authority to do so has never for an instant been questioned. Nowhere can there be found a suggestion that Section 201 of the Judicial Code has been repealed. If a statute which expressly states that the Chief Justice *may* assign certain judges to hold district court in any district means that he *may not* so assign them, a new and startling rule of statutory interpretation by opposites has come into effect.

In view of the very clear language of the statutes, the Government deems it unnecessary to argue that Judge Mack may in any event be regarded as a judge *de facto,* whose designation can not be collaterally attacked. (*Ex parte Ward,* 173 U. S. 452; *McDowell* v. *United States,* 159 U. S. 596; *Ball* v. *United States,* 140 U. S. 118, 129.) The clear terms of the law, it is submitted, authorized his designation as a judge *de jure.* As a judge *de jure* he was designated by the Chief Justice with all the powers of the regular District Judge. And as a judge *de jure* he presided at the trial of the appellant.

CONCLUSION

The sole issue raised by the petition for *habeas corpus* concerns the designation of Judge Mack. The petitioner claims that he was tried *coram non judice,* and that his conviction was therefore without due process of law. If this contention had merit, it must be conceded that it would raise a constitutional question properly cognizable in this

Court. But for the reasons set forth above it is submitted that the contention has no merit and that the appeal is frivolous.

There is in this case no other contention which could possibly be open for argument in the Circuit Court of Appeals. No ground therefore exists for transferring the appeal to the Circuit Court of Appeals under section 238a of the Judicial Code (Act of September 14, 1922, c. 305, 42 Stat. 837). Such a transfer could accomplish no useful purpose and would result only in further delay.

It is therefore respectfully submitted that this appeal should be dismissed or, in the alternative, that the judgment of the District Court should be affirmed. And in order that speedy justice may be done, and that the appellant may without further delay begin to serve the sentence imposed upon him nearly three years ago, it is respectfully requested that the mandate of this Court should issue forthwith.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.

AUGUST, 1925.

○

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 185.—October Term, 1925.

Arthur E. Donegan, Appellant, *vs.* B. E. Dyson, as United States Marshal for the Southern District of Florida.	Appeal from the District Court of the United States for the Southern District of Florida.

[November 16, 1925.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is an appeal from a judgment in a *habeas corpus* case remanding the petitioner. It is brought under Section 238 of the Judicial Code, on the ground that it involves the construction or application of the Constitution of the United States.

March 5, 1919, Donegan was indicted in the United States District Court for the Southern District of Florida, and in the Tampa Division, charged with the offense of misapplication and abstraction of funds of a National Bank in violation of the banking laws of the United States. At a subsequent term he was tried, convicted and sentenced to a term of three years' imprisonment in the Atlanta Penitentiary. On a writ of error his conviction was affirmed by the Circuit Court of Appeals for the Fifth Circuit. He applied for a writ of certiorari in this Court, which was denied. 265 U. S. 585. While in the custody of the United States marshal, after the coming down of the mandate of the Circuit Court of Appeals, he filed this petition for the writ of *habeas corpus*. The ground for the petition is that United States Circuit Judge Julian W. Mack, who presided in the cause in which the petitioner was convicted, had no power or jurisdiction to act as Judge in the District Court for the Southern District of Florida. Judge Mack, as the petition avers, was one of the five additional United States Circuit Judges appointed at the time of the creation of the Court of Commerce, by virtue of the Act of June 18, 1910, 36 St. 539, c. 309. The petition sets out the designation in accord with which Judge Mack sat:

"Honorable Julian W. Mack,
United States Circuit Judge,
New York, N. Y.

"Sir:

"The Senior Circuit Judge of the Fifth Circuit having certified that on account of the accumulation and urgency of business in the United States District Court for the Southern District of Florida, it would be a great public advantage if you could be assigned to service in said District court, and your consent in writing to be designated and appointed to serve in said district court having been duly signed and exhibited to me, now, therefore, pursuant to the authority vested in me by section 201 of the Judicial Code of the United States as amended by the acts of congress approved October 22, 1913, I do hereby designate and assign you for service in the District Court of the United States for the Southern District of Florida, during the period commencing January 20, 1923, and ending March 31, 1923, and for such further time as may be required to complete unfinished business.

"Dated January 11th, 1923, Washington, D. C.

WM. H. TAFT,
Chief Justice of the United States."

It is said that this designation was without authority of law and therefore that the proceeding in the District Court against the petitioner was *coram non judice* and his conviction and present custody in pursuance thereof is without due process of law in violation of the Fifth Amendment.

The original Act creating the court had this provision (36 Stat. 541, c. 309):

"If, at any time, the business of the Commerce Court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any circuit court or circuit court of appeals."

When by the Judicial Code the circuit courts were abolished, 36 St. 1087, and in Chapter 13 the powers of the circuit courts were conferred upon the district courts, sections 291 and 292 of that chapter provided:

"Sec. 291. Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

"Sec. 292. Whenever, in any law not contained within this Act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this Act into which has been carried or revised the provision of law to which reference is so made."

In addition to these provisions, Section 201 of the Judicial Code provided expressly as follows (36 St. 1087, 1147):

"Sec. 201. The five additional circuit judges authorized by the Act to create a Commerce Court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned by the Chief Justice of the United States for service in the district court of any district, or the circuit court of appeals for any circuit, or in the Commerce Court, *and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit.*"

The Commerce Court was abolished by the Act of October 22, 1913, ch. 32 (38 St. 208, 219). While the court was abolished, no attempt was made to abolish the offices of the Judges. More than that, there was this special saving clause in the Act abolishing the Commerce Court, 38 St. 219:

"Nothing herein contained shall be deemed to affect the tenure of any of the Judges now acting as Circuit Judges by appointment under the terms of said Act, but such Judges shall continue to act under assignment, as in the said Act provided, as Judges of the District Courts and Circuit Courts of Appeals."

The contention is first that Sections 200 to 206 of the Judicial Code, which incorporated the provisions of the Act establishing the Commerce Court, were necessarily repealed by the Act of October 22, 1913, taking effect December 31, 1913. In view of the saving clause of that Act, we think this view quite untenable, and that Section 201 was entirely saved in its application.

It is then submitted that even if Section 201 was saved, that the Circuit Judge surviving the Court of Commerce is a judge without a circuit and that when assigned to the Fifth Circuit or any other circuit he goes to the circuit as *pro tempore* a judge of that circuit, and has only the powers and jurisdiction of such Circuit Judge provided in Section 201, which are the powers and jurisdiction conferred in the Judicial Code "upon a Circuit Judge in his Circuit." Now it is said that a regularly appointed circuit judge in a circuit can exercise power and jurisdiction in a district court

of his circuit only after designation and assignment by the circuit justice of his judicial circuit, or by the senior circuit judge thereof, in accordance with the language of Section 18, which is, as amended September 14, 1922 (42 St. 837, ch. 306):

"Section 5. The Chief Justice of the United States or the Circuit Justice, in any judicial circuit, or the Senior Circuit Judge thereof, may, if the public interest requires, designate and assign any Circuit Judge of a judicial circuit to hold a district court within such circuit."

The reference to the Chief Justice, it is said, is to him only as a circuit justice in the circuit to which he is allocated by order of the Court, and that at the time was the 4th Circuit, not the 5th. It is urged, therefore, that after the Chief Justice had under Section 201 assigned this former Commerce Court Circuit Judge to the 5th Circuit, it was, in addition, necessary that the Circuit Justice of the 5th Circuit, or the Senior Circuit Judge of that circuit, should then assign him as a *pro tempore* Circuit Judge of the 5th Circuit to the particular district court of that circuit in which he was to exercise the duties of a district judge. We think such reasoning is making complex a very simple statute and going out of the way to create confusion. Section 201 gives to the Chief Justice full discretion without further designation by any other judge to vest in a commerce court circuit judge full authority directly to act as judge either in a particular district court or in the circuit court of appeals of any circuit, and the designation of Judge Mack in this case was ample for the purpose. We thus do not think it necessary to consider whether even if the designation had not been valid, the sitting judge should be regarded as a judge *de facto* whose authority could not be questioned in a collateral attack, like a proceeding in *habeas corpus.*

No question has been made whether the appeal really involves the construction or application of the Federal Constitution, such that if the construction contended for were correct and the judge were sitting without warrant, the trial would be without due process of law. We have assumed that for the purposes of the decision and also that the question could be raised on *habeas corpus.*

The action of the District Court in dismissing the petition and remanding the prisoner is

Affirmed.